STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

GWENDALYN L. ROYAL and
JOHN ROYAL,

Plaintiff,

vs. Case No. 2005-3627-NO

THOMAS MERCER and
MARGARET MERCER,

Defendant.

_____/

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and a motion for security for costs. Plaintiff[1] has filed responses seeking denial of those motions.

Plaintiff filed this complaint on September 12, 2005. Plaintiff claims that on May 26, 2003, she was involved in an incident at a home owned by defendants. According to plaintiff, she was exiting the home by walking down steps into the garage and fell. This incident allegedly caused injury to plaintiff's right foot requiring several surgeries and recurrent pain. Plaintiff now seeks damages for defendant's alleged negligence. On October 28, 2005, count II, third party beneficiary of contract between defendants' home builder and defendants, and count III, nuisance per se/in fact, of plaintiff's complaint were dismissed without prejudice.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. In reviewing such a motion, the court will consider affidavits, pleadings, depositions, admissions, and

[1] "Plaintiff" is used to refer to Gwendalyn Royal. John Royal's only claim is for loss of consortium based upon this claim of negligence.

documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Smith v Globe Life Insurance Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is (1) no genuine issue in respect to any material fact and (2) the moving party is entitled to judgment as a matter of law. *Smith*, *supra*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 446.

Defendants assert there is no evidence that they breached any duty owed to plaintiff. Defendants argue that they owed no duty to warn plaintiff of any risk associated with ordinary steps in plain view. Defendants contend the steps were not a hidden danger and plaintiff knew of their existence. Even if the steps were considered a dangerous condition, defendants claim, the steps were open and obvious without any special aspect. Defendants argue plaintiff's claim is based on speculation and conjecture. In addition, defendants maintain that sanctions are necessary since plaintiff's claim lacks legal foundation. Further, if the Court denies defendants motion for summary disposition, defendants motion for security for costs.

Plaintiff responds that the diminished visibility caused by a shadow on the step created a hidden danger and defendant failed to warn her of this danger. Plaintiff contends it is factually disputed whether the danger was open and obvious due to the shadow cast on the step. Plaintiff argues that the claim is not based on speculation and conjecture since plaintiff and expert testimony substantiate it. Therefore, plaintiff insists the claim is legally sound and does not require sanctions or security for costs.

In order to establish a negligence cause of action, a plaintiff must show that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). The threshold question, whether a duty exists, is a question of law solely for the Court to decide. *Girvan v Fuelgas Co*, 238 Mich App 703, 711; 607 NW2d 116 (1999). Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct. *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997). In determining whether to impose a duty, the Court evaluates factors such as the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Girvan, supra.*

A landowner's duty to a visitor depends on their status of trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). In *Stitt, supra*, the Michigan Supreme Court defined a licensee as:

> a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit. (internal citations omitted)

A landowner has no duty of inspection, duty of repair, or duty of affirmative care to make premises safe for a licensee's visit. *Burnett v Bruner*, 247 Mich App 365, 372-373; 636 NW2d 773 (2001).

Additionally, landowners have no duty to safeguard licensees from open and obvious dangers. *Pippen v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). A danger is "open and obvious" if an average user with ordinary intelligence would have been able to discover the

danger and the risk presented upon casual inspection. *Corey v Davenport College of Business*, 251 Mich App 1, 2; 649 NW2d 392 (2002). A common condition, which is neither remarkable nor unavoidable, does not represent the kind of "uniquely dangerous" condition that would warrant removing a case from the open and obvious danger doctrine, particularly where the plaintiff clearly appreciates the risk of harm and, nevertheless, chooses to encounter the condition. *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001).

The parties concede plaintiff was defendants' social guest and a licensee. Here, the parties dispute whether the steps presented a hidden danger known to defendant and unknown to plaintiff. Deposition testimony of plaintiff established that prior to the incident she entered the home, without incident, by means of the steps in question. *See* Exhibit A of Defendant's brief in support of motion for summary disposition, p 6. Plaintiff further stated she observed the steps as she exited the home. *Id.* at p 7. Plaintiff indicated the lighting was bright from the sun, a shadow from a vehicle parked in the garage caused the steps to be shaded, but she could still observe the steps. *Id.* at 7, 17-18. Plaintiff admits the fall was an accident and could not identify any danger associated with the steps. *Id.* at p 8-9. Plaintiff provided expert testimony stating numerous building code violations and potential lighting problems. *See* Exhibit A of Plaintiff's brief in opposition to motion for summary disposition.

The Court concludes, even if a shadow on ordinary steps establishes a danger, the record does not demonstrate this danger was hidden and unknown. Plaintiff admits to observing both the steps and the shadow, but proceeded to descend the steps regardless of the danger.

Defendants do not have a duty to warn plaintiff of dangers admittedly known to her. Further, defendants owed plaintiff no duty to repair or make the premises safe, including the construction of the steps, handrail, or lighting.

Moreover, any danger presented by the steps was open and obvious. In *Bertrand v Alan Ford*, 449 Mich 606; 537 NW2d 185 (1995), the plaintiff tripped and fell on an unmarked cement step-down. The Court held that "steps and differing floor levels were not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Id.* at 614. Steps are considered an everyday occurrence that people encounter; a reasonably prudent person will observe the steps and take care for her own safety. *Id.* at 616.

Here, plaintiff has not established anything unusual about the steps causing them to pose an unreasonable risk of harm. Again, plaintiff's deposition testimony confirms she observed the steps. Plaintiff states a shadow was cast across the steps, creating unique circumstances and an unreasonable risk. The Court disagrees. Plaintiff admits she was aware of the shadow, but could still observe the steps. Consequently, the lighting did not cause an unreasonable risk or unique circumstance, since plaintiff admits she could still observe the steps as she exited. Plaintiff's expert testimony indicates violations of building codes concerning the construction of the steps and handrail. *See* Exhibit A of Plaintiff's brief in opposition to motion for summary disposition. The expert acknowledged variances in stair depth and riser height. As previously indicated ordinary steps and varying floor levels are not actionable unless unique surrounding circumstances are present. *Bertrand, supra*. Further, defendants were not required to repair or make safe the premises for a licensee. Therefore, the steps presented an open and obvious danger.

The evidence fails to demonstrate a question of fact as to whether defendants' breached their duty to warn. From the documents presented, it is clear plaintiff was aware of the hazard presented by the steps. Defendants claim for sanctions is denied as the Court is satisfied plaintiff's complaint possessed a good faith argument. The Court has examined defendant's additional arguments and motion for security of costs, but based upon its conclusion the Court need not address those arguments.

Finally, the Court is aware discovery is open until June 15, 2006. As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.* Although discovery is not completed, further discovery does not stand a chance of uncovering any factual support for plaintiff's allegation that defendants' breached their duty to warn.

For the reasons set forth above, defendant's motion for summary disposition is GRANTED and defendant's motion for security for costs is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: JUN - 9 2006

DMD/aac

cc: Johnnie B. Rambus, Attorney at Law
Michael C. O'Malley, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

JUN - 9 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk